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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER LAWSON,

Defendant and Appellant.

E054808

(Super.Ct.No. RIF10003159)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Alexander Lawson guilty of two counts of committing a lewd or lascivious act upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a).)¹ Defendant pled guilty to a charge of failing to register as a sexual offender. (Pen. Code, § 290, subd. (b).) The trial court sentenced defendant to prison for a term of 10 years, 8 months. Defendant raises three issues on appeal. First, defendant contends the trial court erred by admitting evidence of defendant's prior sexual offenses involving a male victim, because they were too dissimilar from the offenses charged in this case. (Evid. Code, § 1108.) Second, defendant asserts the trial court erred by permitting the use of inaccurate transcripts of defendant's statements to a police detective. Third, defendant contends he should be resentenced because the trial court relied on improper factors during sentencing. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

We present the facts of the current case, then the facts of defendant's prior crimes.

A. CURRENT CONVICTIONS

The victim is female and was born in April 1996. The victim has a friend named Katie, who was approximately the same age as the victim. Defendant lived in the apartment of his niece, Gina, which was directly below Katie's apartment. Defendant was 45 years old at the time of the incidents at issue in this case. When the victim was 13 years old, Katie and the victim went to Gina's apartment to "hang out." Katie's

¹ All subsequent statutory references will be to the Penal Code unless indicated.

friend, Dominic, was at Gina's apartment, and the girls wanted to visit Dominic. Defendant, Dominic, Katie, and the victim watched television for approximately 20 minutes, then Katie and Dominic began playfully wrestling with one another; Katie was on her school's wrestling team. Eventually, Katie and Dominic became upset with one another. The victim went into a bedroom to get away from the fighting. Katie and Dominic left the apartment, leaving only defendant and the victim in the residence.

Defendant and the victim playfully wrestled in the bedroom. Defendant removed his shirt, shut the door and locked it. Defendant wrestled the victim onto a bed and then positioned himself on top of her, straddling her. The victim was lying flat on the bed. The victim tried to "get out from under" defendant by pushing him. As defendant and the victim were facing one another on the bed, defendant moved his hips/pelvic area back and forth on top of the victim's hips—"humping" the victim. Defendant pinned the victim's wrists down. The victim felt defendant's genital area against her leg, but they were both wearing clothing.

The victim believed the wrestling turned sexual in nature when defendant began humping her. The victim yelled for Katie. Katie, who had returned to the apartment, knocked on the bedroom door, which was locked. Defendant climbed off the victim. The victim left the room and she and Katie returned to Katie's apartment. The victim believed she was in the bedroom with defendant for no more than five minutes. Katie believed the victim looked "normal," except that her hair "was a little messy."

The victim told Katie about the humping incident, but told Katie "not to worry about it and that [she] didn't want to go see [defendant] again." The girls then played

videogames or went in the Jacuzzi. The victim spent the night at Katie's apartment.

The next day, Katie and the victim returned to Gina's apartment because Katie had left her shoes there. The victim was scared to return to the apartment, but she went because they picked up the shoes "real quick and then left." The victim did not see defendant while picking up the shoes.

Later that day, the victim was outside speaking to a friend on the telephone, when she saw defendant approaching her. When the victim saw defendant she put her telephone away. Defendant and the victim spoke. Defendant pulled the victim's arm to move her into a dumpster area, which was enclosed by a cinderblock wall. Defendant kissed the victim with an open mouth for a "few seconds." The victim felt defendant's tongue. The victim pushed defendant away and ran to Katie's apartment. The victim did not want to kiss defendant.

Katie saw the victim jogging away from the dumpster enclosure. Katie thought the victim looked like she was scared and in shock. The victim said to Katie, "Let's go upstairs right now." The victim told Katie defendant kissed her and tried to pull her into the dumpster enclosure. Katie's mother called the police. The victim told City of Riverside Police Detective Laura Ellefson that if her and defendant's clothes had been off during the bedroom incident, then defendant would have been raping her. The victim also said that during the dumpster incident, defendant kissed her, made a humping motion, and rubbed her crotch over her clothing. At trial, the victim testified defendant did not rub her genital region.

When Detective Ellefson interviewed defendant after the incidents, defendant denied going into the bedroom with the victim. Defendant said Katie was upset with him because he would not give her Gina's hot combs, which resulted in these fabricated allegations. However, when Officer Ellefson described the victim's allegations to defendant, defendant said the only part that puzzled him was the statement about moving the victim into the bedroom.

After Detective Ellefson turned off her recording device, defendant told the detective that the way the detective "laid it out [describing the allegations] is the way that it went down. The only difference was that it was in the living room and not the bedroom." In regard to the dumpster incident, defendant said, "it was actually her that followed him to the dumpster and that it was her that pretty much initiated the kiss. He questioned why would a teenage girl do that, and then described himself as being an old-school gangster type and that the teenage girls like that, the bad boy thing, and . . . that pretty much that she was the one who wanted it."

B. PRIOR OFFENSE

Troy was born in March 1986, and has lived in Hawaii his entire life. Troy met defendant when defendant was dating Troy's stepfather's sister (step-aunt). In 1999, defendant and Troy's step-aunt lived in a home with Troy and Troy's family. Troy was in eighth grade in 1999. Troy slept in the home's living room. During 1999, Troy twice awoke in the living room, in the middle of the night, to defendant touching him.

Defendant touched Troy's penis and testicles both over and under Troy's clothing. Defendant masturbated Troy. Defendant forced Troy to touch defendant's

penis by placing Troy's hand on his penis. Defendant rubbed Troy's hand on defendant's penis. In 2001, defendant was found guilty of four counts of third degree sexual assault involving a person less than 14 years old (Troy). (Haw. Rev. Stat., § 707-732, subd. (1)(b).)

When Troy was 12 or 13 years old, Troy's family and defendant's family fought with one another. Troy's stepfather had fistfights with defendant. On one occasion, because Troy was angry, he placed nails under the tires of defendant's car.

C. TRANSCRIPT

During trial, the prosecutor played a redacted recording of defendant's interview with Detective Ellefson. The recording was played without interruption. The transcript was published to the jury without objection. When defendant's trial attorney cross-examined the detective, he asked, "That transcript is replete with errors, correct?" Detective Ellefson responded, "Yes, there are some errors."

One part of the transcript reflects defendant told the detective, "_____ 'stays with my niece Gina. I stay here, and from there I went to my sister's cabin.'" Detective Ellefson testified defendant said his "sister [Cathy's]" not his "sister's cabin." There were also errors where the name "Cassie" was used instead of the name "Cathy."

Detective Ellefson said the district attorney's office did not ask her if the transcript was correct; however, she read the transcript the night before she testified and noticed the mistake about the cabin. Detective Ellefson contacted the deputy district attorney that night and left a message letting him know there were errors in the transcript. In the morning, when the deputy district attorney retrieved Detective

Ellefson from the witness room, she told him there were errors in the transcript; he had to return to the courtroom so the two were unable to talk further about the transcript.

Defendant's trial counsel asked the detective about other specific portions of the transcript and whether they contained errors. The detective responded that she could not understand what had been said in those portions of the recording. The detective explained, "I think it was a difficult conversation to understand in general." As defense counsel prepared to ask another question, presumably about the transcript, the trial court said, "Look, tell you what, you're not going to ask that question. Move on. I think you have beaten the transcript to death about the errors in it. The evidence is what they hear with their ears. You can feel free to argue the transcript. Move on from typographical errors or wrong typings in the transcript. Okay?"

Defense counsel argued that there were not typographical errors, rather, there were critical mistakes. Defense counsel asked the detective if the transcript statement, "[Katie] came in and out of that apartment. And [Katie's] not mad at me," was incorrect because it should have been "And [Katie] got, 'g-o-t, got 'mad at me'?" The detective responded, "That's how I understood it, yes." The prosecutor objected to defense counsel asking about the transcript. The trial court said, "I thought you were belaboring the point, but I do think it's fair cross-examination to point out if there are errors in the transcript."

Next, defense counsel asked if the transcript was incorrect where it reflected defendant said, "All of a sudden I see her crying over there." Defense counsel asked if

it should have reflected, “‘All of a sudden I see her mom,’ m-o-m, ‘over there.’?” The detective responded, “That’s how I understood that, yes.”

Defense counsel asked the detective about defendant allegedly saying, “‘And then I was like, Hi, [Katie’s mother], you know, I was serious. And then she went to the [apartment] manager. And I seen her on the phone and I’m standing right there and I’m like, what, are you going to assault me.’” Defense counsel asked if defendant said, “‘are you going to talk to me?’” as opposed to “‘are you going to assault me?’” The detective said she could not understand exactly what defendant said, but she did not believe he used the word “assault.”

Defense counsel asked the detective about statements attributed to her in the transcript. Defense counsel asked if the detective said, “‘There was no physical contact at all, and I’m saying you raped her.’” The detective said the word “not” was missing from the sentence. The detective actually said, “‘I’m not saying [you] raped her.’”

When the prosecutor moved to admit the transcript into evidence, defense counsel objected. Defense counsel argued there were errors in the transcript, which were not pointed out to the jury, due to the trial court limiting defense counsel’s questioning. The trial court informed defense counsel that it had permitted him to question the detective about the errors in the transcript. Defense counsel responded that the transcript had 22 errors, and he only went through the “greatest of those errors” with the detective. The trial court again reminded defense counsel that it had permitted him to go forward with questioning the detective about the transcript errors.

Nevertheless, the trial court told defense counsel he could reopen the transcript issue, in order to discuss further errors in front of the jury. The trial court asked defense counsel, “Is that what you’re asking to do when the jury comes back in, that you’d like to reopen to allow you to point out more errors in the transcript?” Defense counsel responded, “Your Honor, I’m not necessarily needing to point out more errors in the transcript. I think that if the transcript goes to the jury in the jury room, they’re aware of what errors there are. I would object to the transcript going back there.”

The trial court again asked defense counsel if he wanted to reopen the transcript issue in order to point out more errors to the jury. Defense counsel said, “No, that’s not what I’m asking.” The trial court said, “I’m not going to admit the transcript. I do think there’s a lot of errors in it. I’m not going to admit it. The defense apparently is—the offer to reopen to bring out more errors has not been taken up.” Defense counsel requested the trial court take the transcripts away from the jurors. The trial court declined the request, explaining that it had told the jurors they could use the transcripts as an extension of their notes, but it would tell the jurors that the transcripts were “not evidence and that’s why it’s not admitted. So they’re to listen to the tape, and if there are any discrepancies, they’re to go with the CD.”

When speaking to the jury, the trial court said, “And let me make one comment on that, the transcript that we heard [*sic*] earlier. I was convinced that there were some inaccuracies with the transcript. For that reason, it’s not been admitted into evidence. So you will have the ability to play the CD, the tape of that interview. Just remember, that’s the evidence in the case. You can make notes on those transcripts you have. You

can take them in the jury room. Once again, they're like your notes. Don't take them out of here. But just remember, and this obviously makes sense, the evidence is what's on that CD. So if there is any discrepancy, the CD controls."

D. CLOSING ARGUMENTS

During closing argument, defense counsel argued the victim and Katie differed on some of the details surrounding the incidents with defendant, such as whether the victim wrestled with defendant prior to the humping—the victim said she wrestled defendant, while Katie said the victim did not wrestle defendant. Defense counsel further argued there were problems with Detective Ellefson's testimony, because she said she did not lie to defendant when interviewing him, but the transcript reflected she did lie to defendant. Defense counsel asserted that if the jury believed that the victim, Katie, and/or Detective Ellefson had lied, then the jury could disregard that witness's testimony.

Defense counsel went on to argue the jury could not rely on the prosecutor because of the various errors in the interview transcript. Defense counsel argued the transcript errors were malicious because they gave the impression defendant raped a person and then fled to his sister's cabin, while none of those remarks were accurate. Defense counsel asserted the prosecutor and the prosecutor's evidence were not credible, because the transcript reflected "how little . . . they care about the evidence." Defense counsel argued the audio recording and the redacting were also handled by the district attorney's office, so the jury should probably not rely on the CD.

The prosecutor argued there was no reason for the victim to lie. If Katie were upset with defendant, then Katie might have falsely accused defendant of a crime, but it was not logical for the victim to falsely accuse defendant. The prosecutor further asserted that if the girls were lying, then they would not have had so many inconsistent details in their testimonies, such as whether they played videogames or went to the Jacuzzi after the wrestling/humping incident. The prosecutor argued the inconsistencies in the girls' stories were minor, and did not reflect the girls were lying.

The prosecutor asserted Troy would also have had to conspire to lie and it was unreasonable to think so many people conspired against defendant. Further, the prosecutor argued it did not make sense for Troy to fly to California from Hawaii if he had falsely accused defendant of an offense 10 years prior. As to Troy being male and the victim being female, the prosecutor argued the evidence showed defendant's propensity for sexual acts with vulnerable people under the age of 14 years.

DISCUSSION

A. PRIOR OFFENSE EVIDENCE

1. *PROCEDURAL HISTORY*

At a hearing on September 1, 2011, the trial court stated in limine motions had been discussed in chambers. On the record, the trial court and the parties discussed the motions again. The prosecutor explained he wanted to introduce the prior offense evidence involving Troy because the prior and current offenses involved sexual contact with people under the age of 14 years old. (Evid. Code, § 1108.)

Defendant's trial counsel objected to the use of prior offense evidence. Defense counsel asserted the prior offense was not similar to the charged offenses because the prior crimes involved a male while the charged offenses involved a female. Further, defense counsel asserted the prior crimes were different because they involved genital contact and a "quasi-familial relationship."

In regard to the prior crimes occurring in 1999, the prosecutor noted defendant was in prison for "[m]ost of the time" between the prior crimes and offenses involving the victim, which caused the prior offenses to not be remote in time, since incarceration essentially tolls the time factor. The trial court concluded the prior crimes were not remote in time. Defendant was incarcerated for five years in Hawaii.

The trial court concluded the jurors were not likely to be confused by evidence of the prior crimes due to the prior crimes involving a male. The trial court felt the jurors would be able to distinguish the offenses due to the different victims. As to prejudice, the trial court concluded the prior crimes were not prejudicial because the jury would find out defendant was a registered sexual offender due to the charge of failing to register. The trial court reasoned, "[T]hey're going to know that he is a registrant anyhow. How much worse does this make it?" The trial court said it was inclined to permit the prosecutor to use the prior offense evidence, but that it wanted to further study the issue.

On September 6, 2011, defendant's trial counsel filed a brief objecting to the admission of prior offense evidence. In the brief, counsel again asserted the prior crimes and charged offenses were dissimilar because (1) the genders of the victims were

different, (2) the prior offenses involved a quasi-familial relationship, and (3) the prior offenses involved skin-to-skin contact with genitalia, while the charged offenses did not. The prosecution filed its trial brief on September 6, 2011. In the brief, the prosecutor asserted the prior crime evidence was more probative than prejudicial (Evid. Code, § 352) because it showed defendant had a propensity to perform sexual acts upon children under the age of 14 years old.

On September 6, the trial court again discussed the prior offense evidence with the parties. The trial court's tentative opinion was to admit the evidence because it showed defendant had "an unnatural interest in children." The trial court concluded the prior offenses were "fairly recent" and "involve[d] children about the same age." As to the victims' different genders, the trial court concluded the evidence "shows an overall interest in kids about that age, an overall improper interest in children about that age." The trial court concluded the evidence was inherently prejudicial, but that the Legislature designed Evidence Code section 1108 to permit the introduction of propensity evidence.

Defense counsel argued the prior offenses were confusing because the Hawaii statute had different elements than the California statute, and so the jury might incorrectly believe defendant committed the same crimes in Hawaii that he was charged with in California. For example, the Hawaii statute did not involve a gratification element. The trial court said it would take more time to consider the issue.

The following day, on September 7, the trial court ruled the prosecution could use the Hawaii convictions to show defendant's propensity to molest children under the

age of 14 years. (Evid. Code, § 1108.) The trial court then considered what evidence the prosecutor could use to prove the prior crimes. The trial court took judicial notice of the law and convictions, and proposed telling the jury the difference between the California and Hawaii statutes.

Defendant decided to plead guilty to the charge of failing to register as sexual offender. (§ 290.) Defendant entered his guilty plea. The trial court ruled no evidence would be admitted concerning defendant's failure to register as a sexual offender because defendant had "removed it as an issue."

The prosecutor said he wanted to call Troy as a witness to testify about the prior crimes. Defense counsel argued the testimony would be cumulative given the documentary evidence of defendant's convictions. The trial court stated it was "inclined to allow both," unless defense counsel could provide "something" indicating that admitting both would be cumulative.

When discussing jury instructions, the trial court stated Troy's testimony described lewd and lascivious acts under California law (Pen. Code, § 288). The trial court asked the attorneys what prior crime should be listed in the jury instruction. Defendant argued the Hawaii statute should be given in the instruction. The trial court explained there was a problem because Evidence Code section 1108 allowed the use of propensity evidence only if it falls within specific California Penal Code sections. The trial court said, "So for me to sit there and define Hawaii law, none of which is here in [subdivision] (d)(1)(A) of [Evidence Code section] 1108, I think I'd be misinstructing

the jury. Frankly, now that would be a real error.” The trial court decided to identify the prior crimes as “lewd act with a child.”

2. ANALYSIS

Defendant contends the trial court erred by admitting evidence of defendant’s prior sexual offenses involving a male victim, because they were too dissimilar from the offenses charged in this case. (Evid. Code, § 1108.) We disagree.

“This court reviews the admissibility of evidence of prior sex offenses under an abuse of discretion standard. [Citation.] A trial court abuses its discretion when its ruling ‘falls outside the bounds of reason.’ [Citation.]” (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

“Evidence Code section 352 gives a [trial] court the discretion to ‘exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’” (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) Factors that a trial court should consider when deciding whether to allow the presentation of prior sexual offense evidence are: “(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant’s charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether

the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. [Citation.]” (*Id.* at p. 1117.)

We begin with the first factor—probative value. The prior crimes and the current offense are similar because they both involve sexual contact with a child under the age of 14 years, who was in or near defendant’s residence. Further, the prior crimes involved masturbation, while the current crimes involved “humping” and kissing. The crimes could be seen as similar in that they both involve sexual movements without penetration. The similarities between the crimes demonstrate defendant has a propensity to sexually molest children under the age of 14 who are in or near his home. Accordingly, we conclude the prior crimes evidence had probative value.

We now consider the second factor—whether the propensity evidence is stronger or more inflammatory than the evidence of the charged acts. The evidence involving the prior crimes consisted of Troy’s testimony, the judgment from the Hawaii court, and the indictment from the Hawaii prosecuting attorney. The evidence of the charged offenses consisted of the victim’s testimony, Officer Ellefson’s testimony, Katie’s testimony, Katie’s mother’s testimony, and defendant’s interview with Officer Ellefson. Given the various live witnesses and recorded interview, we conclude the evidence of the charged offenses was stronger than the propensity evidence, which only involved one live witness and two documents.

Further, the prior crime evidence was not more inflammatory because Troy said defendant masturbated him and forced him to touch defendant’s penis, while the victim

testified defendant “humped” her while she was pinned down, and used his tongue while kissing her, and Officer Ellefson testified defendant grabbed the victim’s crotch during the kissing incident. Since the present offenses involved holding the victim down, sexual pelvic movement, tongue contact, and touching the victim’s crotch area, we conclude the prior offenses are not more inflammatory—both crimes involve sexual movements, and contact, while the current offense also involves holding the victim down.

Third, we examine whether the uncharged conduct was remote or stale. Troy testified the prior crimes occurred in 1999. The current crimes were alleged to have occurred around April 15, 2010. In 2001, defendant was sentenced to prison for five years, due to the crimes against Troy. Incarceration has the effect of tolling the time period during the prison term. (See *People v. Daniels* (2009) 176 Cal.App.4th 304, 317 [Crime was not remote “because defendant had been incarcerated for the vast majority of that period.”].) Approximately 11 years passed between the prior and current crimes, and defendant was incarcerated for five of those 11 years, thus leaving a six-year gap between the offenses. The trial court could reasonably conclude a six-year time period was not remote because case law holds that a 30-year time lapse did not make a crime too remote given the similarities in the offenses. (*People v. Branch* (2001) 91 Cal.App.4th 274, 284-285.)

Fourth, we review the trial court’s decision regarding whether the propensity evidence was likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged conduct.

The jury was given defendant's judgment of conviction for the prior Hawaii offenses, and Troy testified about the prior offenses. Given that the prior offense involved a separate victim that the jury could see, and the prior offenses occurred in a different state, where defendant was convicted, the trial court could reasonably conclude the jury would not be confused by the prior crime evidence because the separate victims and separate states made the crimes distinguishable. Further, since defendant was already convicted of harming Troy the trial court could reasonably conclude the jury was not likely to be distracted by the prior offense evidence—the jury would be less likely to want to punish defendant for his prior crimes.

Fifth, we examine whether admission of the propensity evidence would have required an undue consumption of time. The prior crime evidence consisted of Troy's testimony and two exhibits. Given the single live witness, the trial court could reasonably conclude the prior crime evidence would not consume an undue amount of time.

In sum, the trial court could reasonably conclude the evidence involving Troy was (1) probative; (2) not stronger or more inflammatory than the evidence of the charged acts; (3) not remote in time; (4) not likely to confuse or distract the jurors; and (5) not likely to require an undue consumption of time. Accordingly, based upon the foregoing, we conclude the trial court's decision to allow the prosecution to present evidence of defendant's prior crimes was reasonable, and therefore, we do not find an abuse of discretion.

B. TRANSCRIPT

Defendant asserts his convictions should be reversed because the trial court erred by allowing the jury to use the inaccurate transcripts of defendant's police interview during their deliberations because (1) the transcript was not evidence, and (2) jurors are not allowed to use notes created by other people. The People concede the trial court erred, but contend the error was harmless. We agree with the People.

Section 1137 provides: "Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person. The court shall provide for the custody and safekeeping of such items."

The trial court did not receive the transcript as evidence because it concluded the transcript contained too many errors. However, the trial court allowed the jurors to use the transcript during deliberations as an "extension of their notes." Since the transcript was not evidence and was written by someone other than a juror, the trial court erred by permitting the jury to use the transcript during deliberations.

Since the trial court erred, we now consider whether that error was harmless.

"Transcripts of admissible tape recordings are only prejudicial if it is shown they are so

inaccurate that the jury might be misled into convicting an innocent man. [Citation.]”
(*People v. Brown* (1990) 225 Cal.App.3d 585, 599.)

As set forth in our “Factual and Procedural History” *ante*, the transcript of defendant’s interview with Detective Ellefson contained a variety of errors. During cross-examination, defendant’s trial counsel questioned the detective about several of the errors. For example, defense counsel asked the detective about statements attributed to her in the transcript. Defense counsel asked if the detective said, ““There was no physical contact at all, and I’m saying you raped her.”” The detective said the word “not” was missing from the sentence. The detective actually said, ““I’m not saying [you] raped her.””

Defense counsel went through many transcript mistakes during the cross-examination of Detective Ellefson. The detective did not disagree when asked if the transcript was “replete with errors.” More than once the trial court asked defendant’s counsel if he would like to ask the detective further questions about the errors in the transcript, but counsel declined. The trial court told the jury, “I was convinced that there were some inaccuracies with the transcript. For that reason, it’s not been admitted into evidence.” The trial court then instructed the jury, “[J]ust remember, and this obviously makes sense, the evidence is what’s on that CD. So if there is any discrepancy, the CD controls.”

Given that (1) the jury was aware of the errors in the transcript, (2) counsel declined pointing out more errors, and (3) the court informed the jury not to use the transcript as evidence, there is not a reasonable possibility that the use of the inaccurate

transcript misled the jury. Moreover, the evidence against defendant was strong, in that (1) the victim testified to defendant's wrongful acts; (2) Detective Ellefson testified about the victim's statements following the incidents; and (3) Detective Ellefson testified about defendant's admission. Accordingly, it appears the use of the transcript was not prejudicial because it is not reasonably probable that it led to the conviction of an innocent man.

Defendant contends the trial court's error was not harmless because (1) the case was one of "he said, she said," so the evidence was not overwhelming; (2) the transcript errors were egregious, in that it appeared the detective accused defendant of raping the victim; (3) the trial court told the jurors to use the transcript as an extension of their notes, thus appearing to vouch for the accuracy of the transcript; and (4) the jury was not aware of all the errors in the transcript, due to all the errors not being presented.

Defendant's first argument is not persuasive, because it is not accurate to describe the case as "he said, she said," since Detective Ellefson testified defendant told her that the way the detective "laid it out [describing the allegations] is the way that it went down. The only difference was that it was in the living room and not the bedroom." Given that an admission was involved, we are not persuaded by defendant's argument that the case is one of "factual closeness."

Second, we agree the errors were not merely typographical; however, defendant was presented with ample opportunities to question Detective Ellefson about the errors in the transcript. Defendant was permitted to question the detective during cross-

examination and to reopen after the examination ended. If there were further substantive errors, then defendant could have questioned the detective about them. As the record stands, the jury was aware of the substantive errors pointed out during the detective's cross-examination. As a result, it is not likely that the substantive errors misled the jury.

Third, we disagree that the trial court vouched for the accuracy of the transcript. The trial court told the jury, "I was convinced that there were some inaccuracies with the transcript. For that reason, it's not been admitted into evidence." Given the trial court's statement that it was convinced the transcript was erroneous, it does not appear the trial court vouched for the accuracy of the transcript.

Fourth, we disagree that defendant was prejudiced because the jury was unaware of all the errors in the transcript. As set forth *ante*, defendant was permitted to cross-examine the detective about the errors in the transcript and to reopen after questioning ended. Defendant twice declined the trial court's offer to reopen questioning. Thus, if there were further errors in the transcript that defendant wanted the jury to be aware of, he had ample opportunity to present them to the jury. Defendant cannot invite possible prejudice and then complain of it on appeal. (See *People v. Hernandez* (2003) 111 Cal.App.4th 582, 588 [Fourth Dist., Div. Two] ["[T]he doctrine of invited error operates to estop a party . . . from claiming to have been denied a fair trial by circumstances of the party's own making [citation]."]). As a result we find defendant's argument to be unpersuasive.

C. SENTENCING

1. *PROCEDURAL HISTORY*

The victim's mother requested defendant be "sentenced to the maximum time in state prison" because defendant is a repeat offender and will not stop his pattern of negative behavior." Defendant's Static-99R results placed him in the "Low-Moderate Risk Category for being charged or convicted of another sexual offense." Defendant's probation report reflects a criminal history spanning over 25 years. When defendant was a juvenile, in 1983, he was committed to the California Youth Authority for attempted robbery. Defendant has convictions for petty theft, corporal injury on a spouse, and fighting in public. Defendant has been sentenced to prison for various offenses: (1) burglary in 1987, (2) possession of narcotics for sale in Arizona in 1989, (3) possession of weapons in 1997, (4) sexual assault upon a minor in Hawaii in 2001, and (5) failing to register as a sexual offender in Colorado in 2007. Defendant had been returned to prison for "numerous parole violations."

In the instant case, a probation officer recommended defendant "be denied probation and sentenced to state prison." The probation officer's recommendation does not include a particular number of years to impose. At defendant's sentencing hearing, the trial court said its tentative plan was to impose a prison sentence of either (1) eight years, eight months; or (2) 10 years, 8 months, depending on whether the court imposed the midterm or upper term for count 1. Count 1 involved molesting the victim. (§ 288, subd. (a).)

The prosecutor argued this case involved “the least egregious conduct you could ever do to commit a 288 because [the victim] was so close in age to being 14, and . . . the sexual contact was so minor.” The trial court agreed, stating, “I agree with you that as 288s go, this one is very much on the low end.” The prosecutor said he would understand the court striking defendant’s prior strikes. The prosecutor expressed concern that defendant had a second sexual offense victim, but concluded defendant “seems like a nice guy,” who “got some training while in prison and . . . has a good support group.”

Defendant’s trial counsel argued for the trial court to impose the low prison term. Defendant spoke at his sentencing hearing. Defendant said he paid to have Troy “beat up. And they took him around the corner and beat him up.” Defendant said the sexual assault allegations were made after the battery. Defendant then said, “I mean, you know, you just listening to—to a story. It makes it look like I’m a sexual—I molest kids. I ain’t never touched a child in my life. Well, Your Honor, I will take that back.” Defendant then denied sexually assaulting Troy or molesting the victim.

The trial court said it considered the probation report and Static-99R result. The trial court found defendant’s convictions were numerous or of increasing seriousness. The trial court noted defendant had eight prior felony convictions. Further, the trial court found defendant served a prior prison term, his prior performance on parole or probation was unsatisfactory, and the victim in this case was particularly vulnerable because she was a child at defendant’s house.

As to mitigating factors, the trial court found defendant's offenses were less aggravated than other acts under section 288; however, the trial court expressed concern defendant would reoffend, given defendant's claims that he was wrongfully convicted two times. In regard to Troy, the trial court said, "[Troy] was about the most compelling [section] 288 victim I have ever heard in my life." The trial court also felt the victim and Katie "were strong witnesses." In conclusion, the trial court said, "I believe that this offense itself is not as serious as others; however, I do find an absolute lack of remorse or insight that is necessary in these cases. So the Court therefore selects the aggravated term on Count 1 of eight years." The trial court imposed a total sentence of 10 years, 8 months. The trial court then said to defendant, "I think you've probably got five strikes, I will tell you, so you've gotten your break." The information alleged a variety of prior offenses, including three prior strikes. (§ 667, subds. (c) & (e)(2)(A).)

2. ANALYSIS

Defendant contends the trial court erred by imposing the upper term for count 1 because defense counsel, the prosecutor, and the trial court agreed defendant's crimes against the victim were on the "'low end' of the scale." We disagree.

Sentencing choices are reviewed for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

Circumstances in aggravation that support the imposition of an upper term sentence include: (1) the defendant has numerous prior convictions; (2) the defendant served a prior prison term; (3) the defendant's prior performance on probation or parole was unsatisfactory; and (4) the victim was particularly vulnerable. (Cal. Rules of Court, rule 4.421(a)(3) & (b).)

The trial court considered proper factors in aggravation, such as (1) defendant's convictions being numerous; (2) defendant serving prior prison terms; and (3) defendant's prior unsatisfactory performance on parole. The trial court balanced the aggravating factors with the mitigating factors, but concluded the aggravating factors predominated. The trial court's analysis appears to follow the law and be within the bounds of reason. Thus, we conclude the trial court did not abuse its discretion.

Defendant contends he must be resentenced because the trial court relied on improper factors in selecting the upper term, such as the victim's age and defendant's lack of remorse. As to the victim's age, defendant argues that the victim's age is part of the offense of lewd or lascivious act upon a child under the age of 14 years (§ 288, subd. (a)), and therefore it cannot be a factor in aggravation.

We will assume, for the sake of judicial efficiency, that defendant is correct about the trial court relying on two improper factors. "A single factor in aggravation will support imposition of an upper term. [Citation.] 'When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser

sentence had it known that some of its reasons were improper.’ [Citation.]” (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.)

In addition to two supposedly improper factors, the trial court imposed the upper term due to (1) defendant’s convictions being numerous; (2) defendant serving prior prison terms; and (3) defendant’s prior unsatisfactory performance on parole. Thus, there were three other factors that supported the imposition of the upper term. Further, due to the trial court’s remark that defendant had already received a much lower sentence due to the multiple strikes not being applied, we conclude it is not probable the court would have imposed a lesser term when there were three appropriate factors in aggravation related to defendant’s criminal history. In sum, we find defendant’s argument to be unpersuasive.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.